Capital Insurance Bhd v Wierig Prefab (Selangor) Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R2–24–17 OF 2002
FAIZA TAMBY CHIK J
29 OCTOBER 2002

Arbitration *— Agreement — Jurisdiction of court — Allegation of fraud — Arbitration clause in insurance policies — Application for the dispute to be referred to and be determined by the High Court pursuant to s 25(2) of the Arbitration Act 1952 — Whether court could exercise powers under s 25(2) of the Arbitration Act 1952 — Whether respondents were precluded from invoking arbitration clause — Whether issue of fraud was a matter outside the arbitrator's power to decide — Whether there was a need for applicant to prove fraud beyond a reasonable doubt at this stage*

The applicant had issued two machinery and equipment insurance policies ('the policies') covering the respondents' machinery and equipment purportedly located at Lot PT2, HS(D) 80105, Plot 1 (Parcel 9) Section 13, 40000, Shah Alam, Selangor Darul Ehsan ('the risk location'). The policies covered, inter alia, the peril of theft. The respondents' machinery and equipment were subject to a hire purchase agreement, the hire-financiers being Onward Leasing and Credit Sdn Bhd ('Onward Leasing'). The policies contained an arbitration clause. On or about the 16 March 2000, the respondents notified the applicant that almost all of the said machinery and equipment insured under the policies were allegedly stolen from the risk location and the respondents subsequently intimated a claim for an indemnity under the policies for the amounts of RM3,275,000 and RM124,000 respectively. The claims were supported solely by a statutory declaration made by one Eckart Kurt Wierig ('EKW'), the respondent's managing director. The applicant then assigned a firm of international loss adjusters, surveyors and engineers to investigate the alleged loss by theft. The investigation revealed that in addition to other fundamental breaches of the terms and condition of the policies, it was found that: (a) there was no evidence that the machinery or equipment claimed to have been allegedly stolen, were delivered or kept at the risk location at the time of the alleged theft; (b) EKW's statutory declaration contained unfounded, false and inaccurate information, and particularly with regard to the fact that the said machinery and equipment claimed to have been allegedly stolen were delivered to the risk location and existed in good condition thereat; and (c) many of the items claimed to have been allegedly stolen, were in the first place never discharged from Klang Container Terminal in Port Klang, and hence never delivered to the risk location as these items had in fact been sold to a third party in an auction by the Klang Port Authority after the respondent had failed to settle the necessary port charges. The applicant subsequently sent letters to the respondents repudiating all claims made in respect of the alleged loss by theft under the policies. This was an application by the applicant

for the orders, inter alia, that: (a) the matter in dispute between the applicant and respondents arising from alleged claims by the respondents under the policies be referred to and be determined by the High Court pursuant to s 25(2) of the Arbitration Act 1952 ('the Act'); (b) condition 9 of the policies which provided for the matter in dispute between the applicant and the respondents to be referred to arbitration shall cease to have effect pursuant to s 25(2) of the Act on the ground that the dispute between the parties hereto involved the issue of fraud; (c) the appropriate forum for the determination of respondents' purported claims under the policies was the High Court and not arbitration proceedings; and (d) the respondents' appointment of a sole arbitrator pursuant to s 9(b) of the Act be nullified and that the authority of the said arbitrator be revoked pursuant to s 25(2) of the Act.

Held, allowing the plaintiff's application:

(1) Section 25(2) of the Act stated that where disputes between parties involved the question of fraud, the High Court shall have the power to order that the arbitration agreement between them shall cease to have effect and to revoke the authority of any arbitrator so appointed and have the dispute be determined by the High Court in Malaya and not arbitration proceedings (see p 455G–H).

(2) The respondents' claim was fraudulent and unfounded because six of the insured items worth RM1,707,300 and the remaining two insured items worth RM168,300 could never have been delivered to the risk location and could never have been stolen as alleged by the respondents since they had been sold to a third party at an auction by the Klang Port Authority after the respondents had failed to settle the necessary port charges. It appeared that the respondents had nonetheless, by fraudulent means, obtained insurance coverage from the applicant, and insured these items on the pretext that they were delivered and/or kept at the risk location (see pp 460G–461A).

(3) It had been established beyond doubt that the insurance claim preferred by the respondents under the policies was fraught with misrepresentations, misstatements, inaccuracies and falsehood and in breach of the policies. As such, the arbitration agreement in terms of condition 9 did not operate to exclude the jurisdiction of the courts to deal with the dispute arising between the parties to the contract. Parties cannot by contract oust the courts of their jurisdiction. The scope and extent of the present arbitration clause must be examined in the context of s 25(2) of the Act. To suggest that the effect of conditions 9 and 10 was to preclude the applicant from making this application under s 25(2) of the Act was misplaced and tantamount to taking away the express powers given to the court under s 25(2) of the Act in appropriate cases to

order that an arbitration clause shall cease to have effect, namely when one of the substantial matters at issue involved a question of fraud (see p 462D–G); *Lai Siew Wah Sdn Bhd v Ng Chin* [1988] 1 MLJ 393, *Malaysia Government Officers' Co-operative Housing Society Ltd v United Asia Investment Ltd & Ors* [1972] 1 MLJ 113, *Radford v Hair & Ors* [1971] 2 All ER 1089 and *Permavox Ltd v Royal Exchange Assurance* [1939] 64 Lloyds List 145 followed.

(4) When one of the substantial matters at issue was a question of fraud, the respondent was precluded from invoking the arbitration clause as the issue of fraud was a matter outside the arbitrator's power to decide. Therefore, it was not a question of the applicant unilaterally departing from the terms of the said arbitration clause as asserted by the respondents. It followed therefore that the respondents cannot place any reliance on the 'contra proferentem' rule or the 'doctrine of estoppel'. In any event, estoppel had not been specifically pleaded by the respondents and the applicant had all along maintained that the dispute should be decided by the High Court and not by arbitration. The applicant's conduct had always been consistent in this regard (see pp 463C, F–464A).

(5) The applicant needed only to show a bona fide allegation of fraud. There was no need for the applicant to prove fraud beyond reasonable doubt at this stage. The allegation of fraud need only be proven beyond reasonable doubt at the trial stage. So long as the allegation was bona fide and was not a bare allegation or frivolous, the court ought to exercise its discretion given to it under s 25(2) of the Act. At this stage, once the court was satisfied that one of the substantial matters at issue is an allegation of fraud and the allegation is bona fide and supported, the matter ought to be referred for adjudication before a court of law (see p 464B–D).

[Bahasa Malaysia summary

Pemohon telah mengeluarkan dua polisi insurans mesin dan peralatan ('polisi-polisi tersebut') yang melindungi mesin dan peralatan responden-responden yang dikatakan terletak di Lot PT2, HS(D) 80105, Plot 1 (Parcel 9) Seksyen 13, 40000 Shah Alam, Selangor Darul Ehsan ('lokasi berisiko'). Polisi-polisi tersebut melindungi, antara lain, daripada kecurian. Mesin dan peralatan responden-responden tertakluk kepada satu perjanjian pajakan, pembiaya-pembiaya pajakan yang merupakan Onward Leasing and Credit Sdn Bhd ('Onward Leasing'). Polisi-polisi tersebut mengandungi satu fasal timbangtara. Pada 16 Mac 2000, responden-responden telah memberitahu perayu bahawa hampir semua mesin dan peralatan yang diinsuranskan di bawah polisi-polisi tersebut dikatakan telah dicuri daripada lokasi berisiko dan responden-responden berikutan itu telah membuat satu tuntutan untuk indemniti di bawah polisi-polisi tersebut untuk jumlah RM3,275,000 dan RM124,000 masing-

masingnya. Tuntutan-tuntutan tersebut telah disokong hanya dengan satu deklarasi statutori yang dibuat oleh Eckart Kurt Wierig ('EKW'), pengarah urusan responden. Pemohon kemudian telah melantik sebuah firma pelaras kerugian antarabangsa, juruukur-juruukur dan jurutera-jurutera untuk menyiasat kerugian yang dikatakan akibat kecurian tersebut. Siasatan tersebut menunjukkan bahawa selain daripada perlanggaran-perlanggaran penting terma-terma dan syarat-syarat polisi-polisi tersebut, ia didapati bahawa: (a) tiada keterangan bahawa mesin atau peralatan yang dikatakan telah dicuri, telah dihantar atau disimpan di lokasi berisiko pada masa kecurian yang dikatakan; (b) deklarasi statutori EKW mengandungi maklumat yang tidak berasas, tidak benar dan tidak tepat, dan terutamanya berhubung hakikat bahawa mesin dan peralatan yang dikatakan dicuri telah dihantar ke lokasi berisiko dan berada dalam keadaan yang baik; dan (c) kebanyakan daripada barang-barang yang dikatakan telah dicuri, tidak dikeluarkan daripada Terminal Kontena Klang di Port Klang, dan justeru itu tidak dihantar ke lokasi berisiko kerana barang-barang berikut sememangnya telah dijual kepada satu pihak ketiga dalam satu lelongan oleh Pihak Berkuasa Pelabuhan Klang selepas responden gagal untuk menyelesaikan caj-caj pelabuhan yang perlu. Pemohon kemudian telah menghantar beberapa surat kepada responden-responden menolak semua tuntutan yang dibuat berhubung dengan kerugian yang dikatakan akibat kecurian di bawah polisi-polisi tersebut. Ini adalah permohonan oleh pemohon untuk perintah-perintah, antara lain, bahawa: (a) perkara yang dipertikaikan antara pemohon dan responden-responden yang timbul daripada tuntutan-tuntutan yang dikatakan oleh responden-responden di bawah polisi-polisi tersebut dirujuk kepada dan ditentukan oleh Mahkamah Tinggi menurut s 25(2) Akta Timbangtara 1952 ('Akta tersebut'); (b) syarat 9 kepada polisi-polisi tersebut yang memperuntukkan untuk perkara yang dipertikaikan antara pemohon dan responden-responden dirujuk kepada penimbangtara hendaklah tamat berkuatkuasa menurut s 25(2) Akta tersebut atas alasan bahawa pertikaian antara pihak-pihak melibatkan persoalan tentang fraud; (c) forum yang sesuai untuk menentukan tuntutan-tuntutan responden-responden yang dikatakan di bawah polisi-polisi tersebut adalah Mahkamah Tinggi dan bukan prosiding timbangtara; dan (d) perlantikan seorang penimbangtara oleh responden-responden sebagai menurut s 9(b) Akta tersebut dibatalkan dan bahawa kuasa penimbangtara tersebut dibatalkan menurut s 25(2) Akta tersebut.

Diputuskan, membenarkan permohonan plaintif:

(1) Seksyen 25(2) Akta tersebut menyatakan bahawa di mana pertikaian antara pihak-pihak melibatkan persoalan tentang fraud, Mahkamah Tinggi hendaklah mempunyai kuasa untuk memerintahkan bahawa perjanjian timbangtara antara mereka hendaklah tidak lagi berkuatkuasa dan untuk membatalkan kuasa mana-mana penimbangtara yang telah dilantik dan

mengemukakan pertikaian tersebut untuk ditentukan oleh Mahkamah Tinggi dan bukan prosiding timbangtara (lihat ms 455G–H).

(2) Tuntutan responden-responden adalah berunsur fraud dan tidak berasas kerana enam daripada barang-barang yang diinsuranskan bernilai RM1,707,300 dan yang baki dua lagi barang-barang yang diinsuranskan bernilai RM168,300 tidak mungkin telah dihantar ke lokasi berisiko dan tidak mungkin dicuri sebagaimana yang dikatakan oleh responden-responden kerana barang-barang tersebut telah dijual kepada pihak ketiga di satu lelongan oleh Pihak Berkuasa Pelabuhan Klang selepas responden-responden gagal untuk menyelesaikan caj-caj pelabuhan. Ia kelihatan bahawa responden-responden telah, melalui cara fraud, mendapatkan perlindungan insurans daripada pemohon, dan menginsuranskan barang-barang tersebut dengan helah bahawa barang-barang tersebut telah dihantar dan/atau disimpan di lokasi berisiko tersebut (lihat ms 460G–461A).

(3) Ia telah ditetapkan melampaui keraguan bahawa tuntutan insurans yang dibuat oleh responden-responden di bawah polisi-polisi tersebut penuh dengan salah nyata, pernyataan silap, ketidaktepatan dan kepalsuan dan perlanggaran polisi-polisi tersebut. Oleh itu, perjanjian timbangtara berkaitan syarat 9 tidak beroperasi untuk mengecualikan bidang kuasa mahkamah untuk mengendalikan pertikaian yang timbul antara pihak-pihak kepada kontrak. Pihak-pihak tersebut tidak boleh melalui kontrak menyingkir bidang kuasa mahkamah. Skop dan setakat mana fasal timbangtara semasa perlu diperiksa dalam konteks s 25(2) Akta tersebut. Untuk mencadangkan bahawa kesan syarat-syarat 9 dan 10 adalah untuk menghalang pemohon daripada membuat permohonan ini di bawah s 25(2) Akta tersebut telah disalahletak dan sama seperti mengambil kuasa-kuasa nyata yang diberikan kepada mahkamah di bawah s 25(2) Akta tersebut dalam kes-kes yang sesuai untuk memerintahkan satu fasal timbangtara yang tidak patut berkuatkuasa lagi, terutamanya apabila salah satu daripada perkara-perkara penting yang dipersoalkan melibatkan satu persoalan tentang fraud (lihat ms 462D–G); *Lai Siew Wah Sdn Bhd v Ng Chin* [1988] 1 MLJ 393, *Malaysia Government Officers' Co-operative Housing Society Ltd v United Asia Investment Ltd & Ors* [1972] 1 MLJ 113, *Radford v Hair & Ors* [1971] 2 All ER 1089 dan *Permavox Ltd v Royal Exchange Assurance* [1939] 64 Lloyds List 145 diikut.

(4) Apabila salah satu daripada perkara-perkara penting yang dipersoalkan adalah satu persoalan tentang fraud, responden dihalang daripada menggunakan fasal timbangtara kerana persoalan tentang fraud adalah satu perkara yang luar daripada kuasa penimbangtara untuk membuat keputusan. Oleh itu, ia bukan satu persoalan di mana pemohon telah di satu pihak menyimpang daripada terma-terma dalam fasal timbangtara

tersebut sebagaimana yang ditegaskan oleh responden-responden. Oleh yang demikian responden-responden tidak boleh bergantung kepada peraturan 'contra proferentem' atau 'doctrine of estoppel'. Dalam apa keadaan, estopel telah tidak diplikan secara spesifik oleh responden-responden dan pemohon telah sepanjang masa mengekalkan bahawa pertikaian tersebut sepatutnya diputuskan oleh Mahkamah Tinggi dan bukan oleh penimbangtara. Perbuatan pemohon sentiasa konsisten berkaitan perkara ini (lihat ms 463C, F–464A).

(5) Pemohon hanya perlu menunjukkan satu pengataan bona fide fraud. Tidak perlu untuk pemohon membuktikan fraud melampaui keraguan munasabah di peringkat ini. Pengataan fraud hanya perlu dibuktikan melampaui keraguan munasabah di peringkat perbicaraan. Selagi pengataan tersebut adalah bona fide dan bukan satu pengataan kosong atau remeh, mahkamah patut menggunakan budi bicara yang diberikan kepadanya di bawah s 25(2) Akta tersebut. Di peringkat ini, apabila mahkamah berpuas hati bahawa salah satu daripada perkara-perkara penting yang dipersoalkan adalah satu pengataan fraud dan pengataan tersebut adalah bona fide dan menyokong, perkara tersebut patut dirujuk untuk pengadilan di hadapan mahkamah undang-undang (lihat ms 464B–D).]

[*Editorial note*: The respondent has appealed to the Court of Appeal vide Civil Appeal No W–02–844 of 2002.]

Notes

For cases on jurisdiction of court on arbitration agreement, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 877–883.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

Lai Siew Wah Sdn Bhd v Ng Chin [1988] 1 MLJ 393 (folld)

Malaysia Government Officers' Co-operative Housing Society Ltd v United Asia Investment Ltd & Ors [1972] 1 MLJ 113 (folld)

Permavox Ltd v Royal Exchange Assurance [1939] 64 Lloyds List 145 (folld)

Radford v Hair & Ors [1971] 2 All ER 1089 (folld)

Legislation referred to

Arbitration Act 1952 ss s 9(b), 25(2)
Arbitration Act 1934 [Eng] ss 13(2), 14(2)
Insurance Act 1996

R Mohana Krishnan (*Sri Ram & Co*) for the applicant.
Hillary D'Cruz (*SK Khoo & Assoc*) for the respondent.

Faiza Tamby Chik J: Enclosure 1 is an application by the applicant for the following orders:

(a) a declaration that the matter in dispute between the applicant and respondents herein arising from alleged claims by the respondents under a machinery and equipment insurance policy nos D99AGAMEQ000217 and D99AGAMEQ000199 respectively ('the policies') referred to and be determined by the High Court in Malaya pursuant to s 25(2) of the Arbitration Act 1952 ('the Act');

(b) a declaration that condition 9 of the policies which provides for the matter in dispute between the applicant and the respondents to be referred to arbitration shall cease to have effect pursuant to s 25(2) of the Act on the ground, inter alia, that the dispute between the parties hereto involves the issue of fraud;

(c) a declaration that the appropriate forum for the determination of respondents' purported claims under the policies is the High Court in Malaya and not arbitration proceedings;

(d) a declaration that the respondents' appointment of a sole arbitrator pursuant to s 9(b) of the Act on 14 August 2001 be nullified and that the authority of the said arbitrator be revoked pursuant to s 25(2) of the Act; or

(e) that the costs of and occasioned by this application and all incidental costs prior to this application relating to the appointment of the said arbitrator be borne by the respondents.

The said application is made pursuant to s 25(2) of the Act, which allows for such applications to be made. Section 25(2) states as follows:

> Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to arbitration, and a dispute which so arises involves the question whether any such party has been guilty of fraud, the High Court shall, so far as may be necessary to enable that question to be determined by the High Court, have power to order that the agreement shall cease to have effect and power to give leave to revoke the authority of any arbitrator or umpire appointed by or by virtue of the agreement.

In short, s 25(2) of the Act states that where disputes between parties involve the question of fraud, the High Court shall have the power to order that the arbitration agreement between them shall cease to have effect and revoke the authority of any arbitrator so appointed and have the dispute be determined by the High Court of Malaya and not arbitration proceedings (see s 25(2) of the Act). This application was prompted as a result of the respondents' refusal to have the dispute determined by the High Court of Malaya, notwithstanding that the dispute between the parties hereto involved the question of fraud. Although put on notice of the same, the respondents nonetheless proceeded to appoint a sole arbitrator pursuant to s 9(b) of the Act. The following affidavits have been filed in support and in opposition of encl 1, namely:

(a) The applicant's affidavit in support, affirmed by Mohd Khalid bin Abu Hassan on 15 April 2002 ('the applicant's first affidavit'); A

(b) The respondents' affidavit in reply, affirmed by Eckart Kurt Wierig on 6 June 2002 ('the respondents' first affidavit');

(c) the applicant's second affidavit, affirmed by Mohd Khalid bin Abu Hassan on 2 August 2002 ('the applicant's second affidavit'). B

The applicant is an insurance company licensed under the Insurance Act 1996 to carry on the business of underwriting general insurance business. The respondents are contractors involved in the business of construction. It is not in dispute that the applicant had issued two Machinery and Equipment Insurance Policy Nos D99AGAMEQ000199 and D99AGAMEQ000217 respectively ('the policies') covering the respondents' machinery and equipment purportedly located at Lot PT2, HS(D) 80105, Plot 1 (Parcel 9) Section 13, 40000 Shah Alam, Selangor Darul Ehsan ('the risk location'). It is also not in dispute that the policies covered, inter alia, the peril of theft, and that the policies were in force at the time of the alleged theft, ie 16 March 2000 (see the policies marked as exhs 'HRM–1' and 'HRM–2' respectively in the 'applicant's first affidavit'). It is also not in dispute that the respondents' machinery and equipment at the risk location were subject to a hire purchase agreement, the hire financiers being Onward Leasing and Credit Sdn Bhd ('Onward Leasing'). A policy endorsement to this effect is stipulated on the policies. It is not in dispute as well that the policies contained an arbitration clause, namely condition 9. The particulars of the insured items under the policies are outline here below for ease of reference: C D E

(i) Policy No D99AGAMEQ000199 F

Item No	Description	Sum Insured (RM)
1	One (1) unit of complete Rotation Plant	371,300
2	One (1) unit of Control System S5 SP5	141,800
3	Fifty four (54) units of Pallets 3.0 m 7.5 m	826,200
4	One (1) unit of Automatic Cleaning Station	37,800
5	One (1) unit of Automatic Oiling Spray Damper	27,500
6	One (1) unit of Concrete Distributor	283,500
7	One (1) unit of Curve Plotter	180,000
8	One (1) unit of Vibratory Platform	126,000
9	One (1) unit of Electrical Transformer FUE 7559	26,500

G H I

10	Fourteen (14) units of Curing Chamber Modules	126,000
11	Two (2) units of Vertical Lift Bridges (within Curing Chamber)	931,500
12	One (1) unit of Fabrication Station for reinforcement	204,800
13	Three (3) units of Scissor Type Elevation Platform	472,500
14	Two (2) units of Cross Travel Cars	306,000
15	Six (6) units of Reel Stands	108,000
16	Packing Materials, Antirust Wax, etc.	30,600
	Total Sum Insured	4,200,000

(See Schedule to the policies marked as exh 'HRM–5' of the applicant's first affidavit)

(ii) Policy No D99AGAMEQ000217

Item No	Description	Sum Insured (RM)
1	One (1) unit of imported reconditioned Forklift Truck	124,000

(See Schedule to the policies marked as exh 'HRM–6' of the applicant's first affidavit)

On or about the 16 March 2000, the respondents notified the applicant that almost all of the said machinery and equipment insured under the policies were allegedly stolen from the risk location and the respondents subsequently intimated a claim for an indemnity under the policies for the amounts of RM3,275,000 and RM124,000 respectively. These claims are supported solely by a statutory declaration dated 19 May 2000 made by one Eckart Kurt Wierig, the managing director of the respondents (see exh 'HRM–7' of the applicant's first affidavit). The items claimed to have been allegedly stolen from the risk location comprised 12 of the 16 items insured under Policy No D99AGAMEQ000199 and one item under Policy No D99AGAMEQ000217, as enumerated under paras (i) and (ii) above. The applicant then assigned Maphilindo International Sdn Bhd a firm of international loss adjusters, surveyors and engineers to investigate the alleged loss by theft and their investigations revealed that in addition to other fundamental breaches of the terms and condition of the policies, it was found:

(a) that there was no evidence that all or any of the machinery or equipment claimed to have been allegedly stolen, were delivered or kept at the risk location or that it had existed at the risk location at the time of the alleged theft;

(b) that the statutory declaration dated 19 May 2000 of the respondents' managing director, Eckart Kurt Wierig (exh 'HPM–7') contained unfounded, false and inaccurate information, and particularly with regard to the fact that the said machinery and equipment claimed to have been allegedly stolen were delivered to the risk location and existed in good condition thereat; and

(c) that many of the items claimed to have been allegedly stolen, were in the first place never discharged from the port of arrival, namely Klang Container Terminal in Port Klang, and hence never delivered to the risk location as these items had in fact been auctioned-off to a company called Far East Crane Transport (Sel) Sdn Bhd on 17 June 1999 by the Klang Port Authority as the respondents had failed to settle the necessary port charges (see exhs 'HRM–8' and 'HRM–9' (B1), (B7) and (B8)).

The applicant subsequently sent letters dated 16 January 2001 to the respondents repudiating all claims made in respect of the alleged loss by theft under the policies and cited various breaches of policy conditions including breach of condition 4 of the policies, which states that no claim is recoverable by the insured where the claim is unfounded or fraudulent or intentionally exaggerated or if any false declaration or statement be made in support thereof (see exhs 'HRM–11' and 'HRM–12' of the applicant's first affidavit). For the purpose of clarity, I shall enumerate the items claimed by the respondents to have been allegedly stolen at the risk location and compare it with the items that were auctioned-off at Port Klang by the Klang Port Authority.

(A) Items which respondents claim to be stolen

See exh 'HRM–7' at p 4

(a) Policy No D99AGAMEQ000199

	Description	Insured Items (as per para (i) above)	Amount (RM)
1	Complete Rotation Plant	Item 1	371,300
2	Pallets	Item 3	826,200
3	Automatic Cleaning Station	Item 4	37,800
4	Automatic Oiling Spray Damper	Item 5	27,500

A	5	Curve Plotter	Item 7	180,000
	6	Vibratory Platform	Item 8	126,000
	7	Curing Chamber Modules	Item 10	126,000
B	8	Vertical Lift Bridges	Item 11	931,500
	9	Fabrication Station for reinforcement	Item 12	204,800
	10	Cross Travel Cars	Item 14	306,000
C	11	Reel Stands	Item 15	108,000
	12	Packing Materials, Antirust wax	Item 16	30,600

D (b) Policy No D99AGAMEQ000217

	Description	Insured Items (as per para (ii) above)	Amount (RM)
1	Komatsu Forklift	Item 1	124,000

E

(B) Items which the Klang Port Authority auctioned-off on 16 June 1999 which are contained in five containers shipped via ex-Hamburg Express. There were 12 items in five containers via ex-Hamburg Express. Refer to Max Schober & Co's, ie the shippers' Invoice No 1081/1 dated 2 February 1998 marked as exh 'HRM–9' (B1), (B7) & (B8) of the applicant's first affidavit and compare it with the items auctioned-off in exh 'HRM–8' of the applicant's first affidavit.

F

G

	Description	Insured Items (as per para (i) above)	Amount (RM)
1	One (1) unit of incomplete Rotation Plant	-	198,000
2	One (1) unit of Control System S5 SP5	Item 2	141,800
3	One (1) unit of Curve Plotter	Item 7	180,000
4	One (1) unit of Vibratory Platform	Item 8	126,000
5	One (1) unit of Electrical Transformer FUE 7559	Item 9	26,500

H

I

6	Fourteen (14) Curing Chamber Modules	Item 10	126,000
7	Two (2) units of Vertical Lift Bridges (within Curing Chamber)	Item 11	931,500
8	Two (2) units of Cross Travel Cars	Item 14	306,000
9	One (1) unit MVK Cutter cum Plotter	-	358,425
10	One (1) unit vibratory/ Compaction Station	-	73,800
11	One (1) unit vertical Lifting Station	-	456,750
12	Two (2) units Cross Travel Cars	Item 14 (duplicated)	306,000
13	One (1) unit Automatic Cleaning Station	Item 4	37,800

It is noted that an analysis of the above scheduled items under (B) above which were in the five (5) containers that were auctioned-off by the Klang Port Authority will reveal the following results:

(a) There were eight (8) insured items which had been auctioned-off, ie items No 2, 7, 8, 9, 10, 11, 14 and 4. They collectively add up to RM1,875,600.

(b) Out of these eight insured items that were auctioned-off, six items were claimed by the respondents to have been stolen from the risk location, ie items No 7, 8, 10, 11, 14 and 4. They collectively add up to RM1,707,300;

(c) The other remaining two insured items that were auctioned-off, ie items No 2 and 9 were alleged to have been delivered to the risk location by the respondents. They collectively add up to RM168,300.

I come to the conclusion that the results of this analysis incontrovertibly proves that the respondents' claim is fraudulent and unfounded. This is because of the six insured items worth RM1,707,300 and the remaining two insured items worth RM168,300 could never have been delivered to the risk location and could never have been stolen as alleged by the respondents since they had been auctioned off by the Kelang Port Authority to a company called Far East Crane Transport (Sel) Sdn Bhd as a result of the respondents' failure to settle the necessary port charges (see exh 'HRM–8' and compare it with exh 'HRM–9' (B1), (B7) and (B8) of applicant's first affidavit). I think since the respondents never took delivery of these six insured items (including the remaining two insured items), the same could

never have been delivered to the risk location. It would appear that the respondents had nonetheless, by fraudulent means, obtained insurance coverage from the applicant, and insured or cause to be insured these items on the pretext that it was delivered and/or kept at the risk location. The respondents now purport to make a fraudulent claim on the basis that these and other insured items were stolen from the risk location.

Further, I think the respondents' claim is fraudulent due to the following further evidence, namely:

(a) by a statutory declaration dated 3 October 2000 made by one Ang Cheng Chun, an ex-employee of the said Eckart Kurt Wierig's (ie the respondents' managing director) who was involved in the transactions at all material time. In his statutory declaration, Ang swears that the items insured under the policies were never in fact delivered to the risk location and did not exist at the risk location at the material time of the alleged loss. Ang also confirmed that the insured items were in fact auctioned off by the Klang Port Authority as the respondents were unable to pay the port charges. Ang's statutory declaration is marked as exh 'HRM–9' in the applicant's first affidavit;

(b) by a statutory declaration dated 13 August 2000 made by one Anandan a/l Subbiah, an excavator operator who swears that there was in fact no machinery and equipment fitting the description of the insured items at the risk location at the material time of the alleged loss. Anandan's statutory declaration is marked as exh 'HRM–10' in the applicant's first affidavit;

(c) that the respondents purportedly only discovered the loss due to the alleged theft on 16 March 2000, and were actually unaware when the alleged theft took place as the risk location was without any form of security or protection prior to the discovery of the loss;

(d) that the hire purchase owners, namely Onward Leasing had filed a writ and statement of claim on 27 July 2000 against the respondents and obtained an injunction restraining the respondents from disposing of the insured property (which the respondents fraudulently claim were stolen). The writ and statement of claim of Onward Leasing is found in the respondents' first affidavit marked as exh 'EKW–3' therein;

(e) that the respondents had not paid Onward Leasing since July 1999 and were indebted to the company for about RM1.8m, being in arrears of ten months instalment payments on the machinery and equipment;

(f) that the suit initiated by Onward Leasing against the respondents (marked as exh 'EKW–3' in the respondents' first affidavit) and in particular para 16 of the statement of claim reveals that the machinery and equipment were subsequently found situated at LKC Jeti, Off Jalan Banting, Telok Panglima Garang, Selangor Darul Ehsan and not at the risk location. The said machinery and equipment in fact formed Line A or part thereof and were insured by the applicant at all material

times, contrary to para 7 of the respondents' first affidavit. The aforesaid machinery and equipment which found situated at LKC Jeti were the same machinery and equipment which were auctioned off to Far East Crane Transport (Sel) Sdn Bhd on 17 June 1999 by the Klang Port Authority as the port charges had not been paid/settled by the respondents. As the said machinery and equipment were never delivered to the respondents given that it had been auctioned off, the said machinery and equipment forming Line A or part thereof could never have been delivered and/or kept at the risk location. Therefore, the respondents claim that the machinery and equipment were stolen from the risk location is clearly false. In fact, para 19 of Onward Leasing's statement of claim indicates that the loss was not occasioned by theft. I think the exhibit marked 'EKW–3' supports and fortifies the applicant's stand that no loss had occurred due to theft and that the respondents' claim under the policies is fraudulent; and

(g) that the equipment and machinery which were auctioned off to Far East Crane & Transport (Sel) Sdn Bhd were subsequently bought by one Syarikat Hup Joo Huat and placed at the aforesaid LKC Jeti, Off Jalan Banting, Telok Panglima Garang, Selangor Darul Ehsan. This is borne out by the exhibit marked 'EKW–9' of the respondents' first affidavit.

Therefore, taking things in its entirety, I conclude that it has been established beyond doubt that the insurance claim preferred by the respondents under the policies is fraught with misrepresentations, misstatements, inaccuracies and falsehood and in breach of condition 4 of the policies.

I am of the view that the arbitration agreement in terms of condition 9 does not operate to exclude the jurisdiction of the courts to deal with the dispute arising between the parties to the contract hereto. It is a principle of law that parties cannot by contract oust the courts of their jurisdiction. The scope and extent of the present arbitration clause must be examined in the context of s 25(2) itself. To suggest that the overall effect of conditions 9 and 10 is to preclude the applicant altogether from making this application under s 25(2) is, with respect, misplaced as it would render the provisions of s 25(2) redundant and contrary to established case law on this area. Such an interpretation is tantamount to taking away the express powers given to the court under s 25(2) in appropriate cases to order that an arbitration clause shall cease to have effect, namely when one of the substantial matters at issue involves a question of fraud. Section 25(2) clearly stipulates that although an agreement between parties provides that disputes between them shall be referred to arbitration (the agreement in our case being condition 9), however when a dispute which so arises involves the question whether any such party has been guilty of fraud, the High Court has the power to order that the arbitration clause shall cease to have effect as well as give leave to revoke the authority of any arbitrator so appointed by virtue of the agreement. The court will be deprived of its power to make orders under s 25(2) of the Act only if it is an arbitration proceeding which falls

within the scope of s 34(1) of the Act, which is not the case here. It is only in arbitration proceedings which fall under s 34(1) that 'the provisions of the Act or any other written law' shall not apply.

It is obvious from the line of authorities submitted by both parties that irrespective of the existence of an arbitration clause in a contract and no matter how wide it is worded, where there is an allegation of fraud made by one party to the contract, then the other party is effectively precluded from invoking the arbitration clause. It was held in the Supreme Court case of *Lai Siew Wah Sdn Bhd v Ng Chin* [1988] 1 MLJ 393, that an allegation of fraud raised by the respondent precluded the appellant from invoking the arbitration clause. It was also held in *Malaysia Government Officers' Co-operative Housing Society Ltd v United Asia Investment Ltd & Ors* [1972] 1 MLJ 113, that when one of the substantial matters at issue was a question of fraud, that issue was a matter outside the arbitrator's power to decide. Yet again in the case of *Radford v Hair & Ors* [1971] 2 All ER 1089, the court held that when there is an allegation of fraud, that allegation is to be regarded as sufficient reason for taking the case away from arbitration and letting it be decided by the court. *The Permavox Ltd v Royal Exchange Assurance* (1939) Lloyds List Vol 64, 145 dealt with s 13(2) of the English Arbitration Act 1934 which is in pari materia with s 25(2) of our Act. The facts and circumstances in that case were somewhat similar to our case in that the respondent in that case had referred the dispute to arbitration. The applicant (an insurance company just like in our case) filed a motion under s 14(2) of the English Arbitration Act for leave to revoke a submission to arbitration on the ground that an issue of fraud had been raised and that therefore the matter ought to be tried in court and not before an arbitrator. The court held that having regard to the charges of fraud the submission to arbitration should be revoked and the matter be tried in open court. Hence it is patently clear from the authorities cited above that when one of the substantial matters at issue is a question of fraud, then the respondent is precluded from invoking the arbitration clause. The simple rationale to this is that the issue of fraud is a matter outside the arbitrator's power to decide. Therefore, it is not a question of the applicant unilaterally departing from the terms of the said arbitration clause as asserted by the respondents. The law says that when there is a question of fraud to be decided, then that question is no longer within the purview of the arbitrator to decide but must be left to the court and the court has the power to do so under s 25(2) of the Act. It necessarily follows therefore that the respondents cannot place any reliance on the 'contra proferentem' rule nor the 'doctrine of estoppel', which reliance is entirely misconceived in the circumstances. Further, estoppel has not been specifically pleaded by the respondents anywhere in their affidavit in reply. The material facts giving rise to an estoppel have also not been pleaded by the respondents anywhere (see *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331). Hence, no reliance can be placed by the respondents on this doctrine, which in any case is not available to them either in law or in fact. In any event, the respondents cannot deny the fact that the applicant had all along maintained that the dispute should be decided by the High Court and not

by arbitration. The respondents were in fact put on notice that the applicant wished for the dispute to go to suit given the allegation of fraud. The applicant's conduct has always been consistent in this regard. Such being the case, the respondents would have six years (from 16 January 2001) within which to bring their purported claim against the applicant under the policy and are not constrained by any period of limitation imposed by conditions 9 and 10 as contended by the respondents.

Contrary to the respondents' contention, I view that the applicant need only show a bona fide allegation of fraud. This was stated by the Supreme Court in *Lai Siew Wah Sdn Bhd.* There is no need for the applicant to prove fraud beyond a reasonable doubt at this stage. The allegation of fraud need only be proven beyond a reasonable doubt at the trial stage. So long as the allegation is bona fide and is not a bare allegation or frivolous, the court ought to exercise its discretion given to it under s 25(2). At this stage, once the court is satisfied that one of the substantial matters at issue is an allegation of fraud and the allegation is bona fide and supported, the matter ought to be referred for adjudication before a court of law (see *Radford v Hair*; *Malaysian Government Officers' Co-operative Housing Society Ltd v United Asia Investment Ltd & Ors*).

It is trite law that once the court is satisfied that there is a bona fide allegation of fraud against a party seeking to invoke the arbitration clause in a contract (ie the respondents), the other party (ie the applicant) may make an application to the High Court and the High Court has the power to order that the arbitration clause (ie condition 9) shall cease to have effect and revoke the authority and appointment of the arbitrator so appointed by virtue of the arbitration clause. The Supreme Court in *Lai Siew Wah Sdn Bhd v Ng Chin* [1988] 1 MLJ 393 dealt with s 25 of the Act. The Supreme Court held that once the court is satisfied that there is a bona fide allegation of fraud against the party seeking to invoke the arbitration clause, then the court will have to exercise its discretion and order that the dispute be determined by the court. It is obvious that the respondents' claim under the policies is fraudulent. There is a bona fide allegation of fraud which merits and warrants investigation. Given that one of the substantial matters at issue is an allegation of fraud, the dispute between the parties hereto ought to be referred to and determined by the High Court of Malaya and not by arbitration proceedings, as provided under s 25(2) of the Act.

I grant order in terms of prayers (a), (b), (c), (d) and (e) of encl 1 herein.

Plaintiff's application allowed.

Reported by Lim Lee Na